The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-270

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay VanFleet, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund the costs of his daughter's private services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals, raising equitable considerations that it asserts would also support denial of the parent's requested relief. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

According to the evidence in the hearing record, a CSE convened on December 16, 2019, found the student eligible for special education as a student with an other health-impairment, and developed an IESP for the student (Parent Ex. B).[1] The December 2019 CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) and two 30-minute sessions per week of individual speech-language therapy (id. at p. 6). The IESP indicated that the student was "Parentally Placed in a Non-Public School" (id. at p. 9).[2]

Turning to the 2023-24 school year at issue, on December 26, 2023, the parent electronically signed a document on Step Ahead's letterhead indicating that he was "aware" of the rate charged for services provided to the student consistent with the December 2019 IESP and that, if the district did not fund the services, he "w[ould] be liable to pay for them" (Parent Ex. C).[3, 4]

In a due process complaint notice, dated January 29, 2024, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (Parent Ex. A at p. 1). The parent indicated that the December 2019 IESP was the last agreed-upon educational program developed for the student and that "the student require[d] the same services" for the 2023-24 school year (id.). The parent asserted he was unable to locate service providers on his own at the district's standard rates for the 2023-24 school year and that the district failed to provide the student with services in accordance with her IESP (id.). The parent claimed that he found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). The parent sought an order requiring the district to continue the student's services under pendency and an award of funding for SETSS delivered by a private company during the 2023-24 school year at "enhanced rates" and an award for the district to issue a related service authorization (RSA) or directly fund related services for providers of the parent's choosing at the rate the providers charge (id. at p. 2).[5]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 3, 2024 and concluded the same day (Tr. pp. 1-24). In a decision dated May 13, 2024, the IHO found that the district failed to meet its burden to prove that it offered and

[1] The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] There is reference in the hearing record to an IESP developed on October 26, 2022 (see Pendency Implementation Form) but that IESP was not offered into evidence during the impartial hearing.

[3] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] According to the district, a CSE convened on January 23, 2024 (Dist. Response to Due Process Compl. Not.); however, a January 2024 IESP was not offered as evidence during the impartial hearing.

[5] In an agreement signed on February 1, 2024, the district agreed that the student's pendency placement lay in an October 26, 2022 IESP and consisted of five periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy (Pendency Implementation Form).

implemented equitable services for the student for the 2023-24 school year and, therefore, denied the student a FAPE (IHO Decision at p. 4). However, the IHO determined that the parent did not meet his burden to prove that the educational services unilaterally obtained were appropriate for the student (id. at p. 6). The IHO held that the evidence was "unclear" as to "what services [we]re being provided to [the s]tudent, the strategies or methodologies being employed to address [the s]tudent's needs, and whether [the s]tudent [wa]s progressing because of [the p]rovider's efforts" (id. at p. 4). Specifically, the IHO determined that the session notes were unreliable because, while the document reflected the dates and times that services were "purportedly provided," the goal and notes fields were left blank for the period from December 26, 2023 to February 2023 (id. at pp. 4-5). Next, although the secretary from Step Ahead testified that the provider entered the information into the session notes, the IHO observed that certain session notes referred to the student by the wrong pronoun, that the provider referred to him/herself in the third person, and that several session notes referenced the same activity, such that the IHO concluded that she did not believe the notes were entered by the provider (id. at p. 5). According to the IHO, even if those discrepancies could have been overlooked, she found that she could not rely on the session notes to determine that the services provided were appropriate as they were "very vague and d[id] not provide detailed information of the methodologies and strategies being used to address [the s]tudent's needs" (id.). Further, the IHO was "persuaded" that the SETSS provider's lack of certification to provide instruction to students beyond second grade "further demonstrate[d] that [Step Ahead] [wa]s not appropriate" for the student (id.). Regarding the speech-language therapy progress report, the IHO determined that, while the document provided information about the student's weaknesses and limited goals, "it provide[d] no information on what strategies or methodologies the Speech Provider [wa]s utilizing to address" the student's weaknesses and goals (id.). Additionally, the IHO found that the report did not "list any progress" the student made, but nonetheless concluded that the student required continuous intervention (id.).

Based on the foregoing, the IHO denied the parent's requested relief but ordered the district to implement SETSS and speech-language therapy as mandated in the December 2019 IESP for the remainder of the 2023-24 school year, conduct new evaluations of the student, and convene a CSE to develop an IESP or an individualized education program (IEP) for the student (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that he did not meet his burden to prove that unilaterally obtained services from Step Ahead were appropriate. The parent asserts that a Burlington/Carter analysis should not apply in this matter but also argues that, even under a Burlington/Carter analysis, he is entitled to his requested relief. The parent argues that he utilized the services of Step Ahead, which used "appropriately credentialed/licensed providers" for the SETSS and speech-language therapy services for which funding was requested and that the providers followed the detailed discussions, goals, and frequency of services the district itself created and recommended in the IESP. The parent also argues that the student's IESP was "sufficient to demonstrate [the s]tudent's present levels of performance when services began as it was created right before services began." Next, the parent asserts that the progress report and session notes "have sufficient detail for each service provided, detailed work being done to the [s]tudent and all that work goes to address the issues each service was required to address."

Further, the parent argues that progress was not a determining factor in deciding whether the services delivered by Step Ahead were appropriate.[6]

Regarding equitable considerations, the parent argues that the agreement with Step Ahead, which was signed by the parent, established the parent's legal obligation to pay for the SETSS and speech-language therapy services. In addition, the parent asserts that the 10-day notice rule does not apply to matters arising under Education Law § 3602-c or in instances where the district did not offer a placement, but, even if it did apply, reduction or denial of reimbursement is not authorized when, as here, the parent did not receive a procedural safeguards notice from the district. The parent also argues that in balancing equitable considerations, the district's conduct should be taken into account and result in an award of the relief sought. The parent argues that the evidence in the hearing record fully supports an award of direct funding to Step Ahead for SETSS and speech-language therapy services delivered to the student during the 2023-24 school year at the rate set by Step Ahead.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the parent did not meet her burden to prove the appropriateness of SETSS and speech-language therapy services from Step Ahead for the 2023-24 school year. As for a cross-appeal, the district argues that, should it be determined that the services from Step Ahead were appropriate, relief should still be denied on equitable grounds. In particular, the district asserts that equitable considerations weigh against an award of funding given the lack of evidence of the parent's legal obligation to pay the costs of the private services, the excessiveness of the hourly rates sought for the services, and the parent's failure to provide the district with proper notice of his intent to obtain private services.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

[6] The parent also alleges that the "IHO, who is not an [sic] a licensed provider of any of the services, replace[d] the credentialed providers' decision-making process as to what work should have been done to [s]tudent for the program to be implemented appropriately" (Req. for Rev. ¶18). However, the parent cites no authority for this argument, and the unreasonable criticism of the IHO appears to be an after the fact attempt to excuse the parent's failure to present evidence to prove that the services delivered to the student by Step Ahead were appropriate to meet the student's special education needs. If the parent wanted to present an expert witness to provide evidence of the student's needs and the services being delivered to the student, the parent could have introduced such evidence during the hearing; however, the parent cannot wait until an appeal to attempt to qualify session notes as expert testimony without having the providers testify.

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year

[7] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[8] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

and, as a self-help remedy, he unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[9] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the

[9] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Step Ahead (Educ. Law § 4404[1][c]).

IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

On appeal, the parent argues that the student's IESP was "sufficient to demonstrate [the s]tudent's present levels of performance when services began as it was created right before services began" and that the Step Ahead providers were simply "delivering the services based on the IESP, which ha[d] detailed discussions, goals and frequency of services" (Req. for Rev. ¶¶ 16-17), yet the IESP the parent offered into evidence in this matter is dated December 2019, not "right before" the SETSS and speech-language services delivered by Step Ahead commenced in December 2023 (compare Parent Ex. B at pp. 3-5, with Parent Ex. I at p. 1). Moreover, there is no evidence in the hearing record that annual goals developed three years prior in 2019 continued to address the student's needs during the 2023-24 school year. Nevertheless, despite that the hearing record indicates there was at least one subsequently developed IESP for the student, the only evidence of

the student's needs included in the hearing record is the description of the student as set forth in the December 2019 IESP (Parent Ex. B). Accordingly, the description of the student from the December 2019 IESP will be reviewed, even that it was developed over three years prior to the beginning of the 2023-24 school year.

According to the December 2019 IESP, an undated administration of the Stanford-Binet Fifth Edition to the student yielded a full scale IQ of 83 (13th percentile), a nonverbal index of 78 (7th percentile), and a verbal index of 90 (25th percentile) (Parent Ex. B at p. 1). Regarding academic skills, the IESP indicated that the student's reading was "a bit below grade level," her reading was "slow," and she hesitated when she read (id. at p. 2). Additionally, the student needed to achieve more fluency and fully understand what she read as she struggled with reading comprehension (id.). According to the IESP, the student's writing skills were below grade level, she had difficulty expressing herself, made spelling mistakes, did not follow punctuation rules, and failed to develop ideas (id.). In math, the student "ha[d] some issues" with concepts, she used her fingers to add and subtract, she did not know multiplication tables well, and struggled solving multi-step problems (id.). Further, the IESP noted that the student had "trouble copying her homework from the board" (id.). The CSE identified strategies to address the student's management needs including that she learned well with pictures, arrays, charts and models, as well as manipulatives (id. at p. 3). The IESP indicated that the student "continue[d] to make progress," and that her "[p]arents believe[d] [the student] [wa]s doing well academically" (id. at p. 2).

Socially, the December 2019 IESP indicated that the student had friends, maintained friendships, was respectful, and followed classroom directions (Parent Ex. B at p. 2). Although the student became embarrassed when she did not understand a math concept or did not know the answer to a question regarding stories, "[t]here [we]re no social developmental concerns voiced" (id.). The IESP indicated that the student's fine and gross motor skills were age and grade appropriate and her general health was good (id. at p. 3).

Turning to the services from Step Ahead, the only witness who testified at the impartial hearing was the company's secretary who had never met the student and did not supervise or have any contact with the student's providers (Tr. pp. 12-13, 15-16, 18). The secretary testified that the providers inputted "session notes," which she "pull[ed] . . . out and put . . . into a folder" (Tr. pp. 16-18; Parent Ex. I).

The parent entered an exhibit into the hearing record identified as "session notes"; however, the document itself does not bear any title or reflect the origin of the document (Tr. p. 7; Parent Ex. I at pp. 1-9). The session notes reflect the student's name; the SETSS provider's name; the speech-language pathologist's name; the dates of sessions, as well as the "time in" and "time out" for each session; and the location of the service (i.e., "school") (Parent Exs. E; I). The session notes also include areas to describe goals, which were all left blank and areas for notes, which were filled in for most speech-language therapy sessions and some SETSS sessions (Parent Ex. I). Overall, a review of the session notes shows that the private providers delivered services to the student from December 26, 2023 through March 19, 2024 (id.).

Review of the session notes shows that the SETSS provider delivered services to the student in sessions generally lasting 15, 45, and 60 minutes in length and occurring at various times

throughout the school day (see Parent Ex. I).[10] From December 26, 2023 through March 4, 2024, the session notes do not include any information about the services delivered to the student by the SETSS provider (see id. at pp. 1-7). On March 4, 2024, the SETSS provider reported working "on improving the student's reading fluency" (id. at p. 7). Thereafter, the SETSS provider reported working with the student on reading comprehension strategies using context clues, supporting the student in accurately answering questions by referencing evidence in a text during English language arts (ELA) instruction, collaborating with the student to enhance reading fluency skills, and assisting the student in completing overdue assignments, preparing for upcoming assessments, and offering note-taking strategies and refocusing, as well as supporting the student during math instruction (id. at pp. 7-9).

Review of the speech-language pathologist's session notes shows that therapy sessions with the student were 30 minutes in length and generally occurred between 11:00 a.m. and 12:30 p.m. at the student's school (see Parent Ex. I). During sessions, the speech-language pathologist worked on improving the student's skills in the areas of literacy, ability to write thematic texts, reading comprehension and problem solving, vocabulary, ability to draw logical conclusions from texts and use critical thinking, active listening skills, and receptive and expressive language (id.). The speech-language pathologist reported using strategies with the student such as using: informational passages to answer multiple choice questions, understand and interpret the content, and compare and contrast ideas; a dictionary to understand unfamiliar words; the "RACE method" to answer questions in writing about text read aloud; math word problems to enhance problem solving skills; and images and texts to draw conclusions and make inferences (id.).

In a report dated January 22, 2024, the speech-language pathologist indicated that she provided one individual 30-minute session per week to the student to address deficits in her recall and problem solving ability, and her difficulty answering questions related to stories, following directions, and making inferences (Parent Ex. F at pp. 1, 2). The speech-language pathologist reported that the student exhibited decreased expressive vocabulary, difficulty formulating syntactically complete sentences, and conveying her thoughts and ideas into meaningful sentences (id. at p. 1). According to the progress report, the student's then-current annual goal was to improve knowledge of age appropriate vocabulary by identifying/inferring the meaning of target words using context clues, identifying antonyms/synonyms for target words, and using newly learned vocabulary words in written sentences of increasing length (id.). The speech-language pathologist reported that the student had not yet mastered producing a sequenced well organized oral narrative about verbally presented instructional level text and required continued intervention (id. at p. 2). New annual goals in the progress report were for the student to improve expressive language skills by using age level sentences and vocabulary in response to various questions, demonstrating text comprehension by answering various questions and using context clues to define unknown vocabulary, and increasing her ability to define curriculum-based vocabulary (id.). Regarding strategies and techniques to achieve her goals, the speech-language pathologist reported that the student "benefit[ted] from prompting, redirection, repetition and praise" (id. at p. 1).

While the speech-language therapy progress report and the notes provided by the speech-language provider in the session notes offer more insight into how that provider addressed the

[10] On occasion, SETSS sessions lasted 35, 75, and 90 minutes in length (see Parent Ex. I at pp. 3-8).

student's needs, it does not cure the gaps in the hearing record regarding the SETSS delivered to the student. The parent did not present the testimony of the SETSS provider or a progress report to describe the SETSS delivered to the student.[11] Thus, the sessions notes stand as the only information about the SETSS provided to the student and, after reviewing the notes, I share the concerns raised by the IHO in her decision (see IHO Decision at pp. 4-5). The IHO found the sessions notes were not "credible" or "reliable" (id. at p. 5). The IHO noted that several fields were left blank in the notes and notes included were vague, at times duplicative, and referred to the student by the wrong pronoun and to the providers in the third person, leading the IHO to question whether the providers inputted the notes (id. at p. 5; Parent Ex. I). While perhaps, as a practical matter, a provider need not maintain copious session notes, here, where the poorly drafted session notes are the only substantive evidence about the SETSS provided to the student, the preponderance of the evidence does not demonstrate the services delivered by Step Ahead were appropriate.

It is worth noting that an integral part of the parent's argument in this matter is that he is "simply request[ing] that the providers be paid for delivering the services based on the IESP" and the he "utilized the services of an [a]gency using appropriately credentialed/licensed providers for each service for which funding is requested, further asserting that "[e]ach provider working on behalf of [a]gency in this regard held appropriate licenses or certifications" (Req. for Rev. ¶¶ 6, 16). However, the parent has not directly addressed the IHO's finding that the SETSS provider was not certified to teach a student of the student's age in this matter. The IHO noted that the SETSS provider did not hold a certification to teach students beyond second grade, which the IHO determined further supported finding that the provider was not appropriate to deliver instruction to the student (IHO Decision at p. 5). The hearing record includes a document reflecting that the SETSS provider named in the session notes held students with disabilities and early childhood education birth to grade 2 initial certificates (Parent Ex. E at p. 1), whereas the student in the present matter was a teenager during the 2023-24 school year (see Parent Exs. B at p. 1; G). Generally, privately-obtained special education services need not be delivered by teachers who are State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the private providers who have reasonable qualifications to deliver instruction that is specially designed to address the student's deficits (Application of a Student with a Disability, Appeal No. 20-140). Here, as one of the parent's central arguments for asserting that SETSS was appropriate is that the provider was properly credentialed, the parent was required to address the IHO's finding to the contrary. Nevertheless, even if the parent had properly appealed from the IHO's finding, the hearing record was not further developed regarding the provider's experience or qualifications, and, accordingly, there is insufficient basis in the hearing record to disturb the IHO's findings on this point.

Based on the totality of the circumstances, there is insufficient basis in the hearing record to disturb the IHO's determination that the parent did not meet her burden to prove that the services delivered to the student by Step Ahead were specially designed to meet the student's unique needs.

[11] Although the parent argues on appeal that "each provider submitted progress reports for their service," the parent cites to the speech-language therapy progress report (Req. for Rev. ¶ 6). There is no SETSS progress report in the hearing record.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the services delivered by Step Ahead during the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of district funding for the services delivered by Step Ahead (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 16, 2024

STEVEN KROLAK
STATE REVIEW OFFICER